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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Supreme Court, U.S.
FILED
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QUESTIONS PRESENTED

- I. CAN APPELLATE COUNSEL'S FAILURE TO FILE A BRIEF ON DIRECT APPEAL BE CONSIDERED NON-PREJUDICIAL OR HARMLESS ERROR AS THE STATE COURT OF APPEALS FOUND?
- II. WHEN THE STATE COURT OF APPEALS DETERMINED THAT THERE WERE ARGUABLE ISSUES THAT COULD BE RAISED ON APPEAL, WAS THE COURT OF APPEALS REQUIRED TO AFFORD PETITIONER THE ASSISTANCE OF COUNSEL BEFORE REVIEWING HIS CASE AND AFFIRMING HIS CONVICTIONS?
- III. WERE PETITIONER'S RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND EFFECTIVE ASSISTANCE OF COUNSEL ON HIS APPEAL OF RIGHT DENIED WHEN THE STATE COURT OF APPEALS PERMITTED PETITIONER'S COUNSEL TO WITHDRAW, SUBSEQUENTLY FOUND ARGUABLE ISSUES IN HIS APPEAL BUT REFUSED TO APPOINT NEW COUNSEL FOR HIM, AND ONLY CONSIDERED THE ARGUABLE ISSUES RAISED IN PETITIONER'S CO-DEFENDANTS' APPEALS?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

The petitioner, Steven Anthony Penson, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio entered in the above-entitled proceeding on October 21, 1987.

OPINIONS BELOW

The Ohio Supreme Court overruled petitioner's motion for leave to appeal and claimed appeal as of right from the judgment and decision of the Second District Court of Appeals, Montgomery County, Ohio. A copy of the Court's entry appears in the Appendix to the Petition at A1. The opinion of the Second District Court of Appeals of Ohio is unreported but is attached in the Appendix at A2.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on October 21, 1987, and this petition was timely filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

Petitioner, Steven Anthony Penson, was indicted for twenty-one (21) counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; one count of gross sexual imposition; and one count of having a weapon under disability. *State v. Penson* (June 5, 1987), Montgomery App. No. 9193, unreported, at 2-3 (attached in Appendix at A2). Each count contained a firearm specification and a specification of a prior felony conviction. *Id.* After a jury trial in the

Montgomery County, Ohio Court of Common Pleas, petitioner was found guilty of fourteen (14) counts of rape; aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; attempted rape; gross sexual imposition; and having a firearm under a disability. Petitioner was also found guilty of all firearm specifications. *Id.* On December 21, 1984, petitioner was sentenced to a term of imprisonment of eighteen (18) to twenty-eight (28) years. *Id.*, at 3.

Petitioner appealed the judgment of the Montgomery County Court of Common Pleas to the Second District Court of Appeals of Ohio.

On June 2, 1986, appellate counsel filed a "CERTIFICATION OF MERITLESS APPEAL" along with a motion to withdraw as appellate counsel, attached in the Appendix at A9. *State v. Penson*, at 4. On June 9, 1986, the Court of Appeals granted appellate counsel's motion to withdraw, and granted petitioner 30 days to file his own brief. *Id.* The court granted successive extensions and petitioner's request to borrow the trial transcript. On November 13, 1986, the court denied petitioner's request for appointment of new counsel, but granted him 15 more days to use the transcript. *Id.* Following a final 25 day extension petitioner failed to file a *pro se* brief. *Id.*

The Court of Appeals reviewed the record of the trial court proceedings to determine if petitioner received a fair trial and whether any prejudicial error occurred. The court stated that it was troubled by counsel's filing an *Anders* brief¹ and that counsel's conclusion that there were no errors which could arguably support was highly questionable. *Id.*, at 4-5. The court concluded this because "considerable briefs" were filed by

¹ Petitioner submits that the Court of Appeals' characterization of counsel's "certification of meritless appeal" as an "Anders brief" is inaccurate as it did not raise any errors or issues that could arguably support the appeal. See *Anders v. California*, 386 U.S. 738, 744 (1967).

petitioner's co-defendants in their respective appeals. *Id.*, at 5. The court further found "[t]he record of the trial court does support several arguable claims." *Id.*

Nevertheless, the court determined that because it had examined the record and already considered the assignments of error raised in the other defendant's appeals, "appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." *Id.*

Pursuant to its own review of the record, the court of appeals did address one issue. The court determined that the trial court failed to charge the jury on one of the elements of the crime of felonious assault in count six of the indictment. The conviction on that count was reversed and the sentence vacated. *Id.*, at 7. Petitioner's convictions were otherwise affirmed.

Petitioner timely appealed to the Supreme Court of Ohio. On October 21, 1987, the Supreme Court dismissed his appeal on the ground that no substantial constitutional question existed. Ohio Supreme Court Entry, Appendix at A1.

A. How The Federal Issues Were Raised And Decided Below

As indicated above, petitioner's counsel on direct appeal filed a motion, which stated in pertinent part:

CERTIFICATION OF MERITLESS APPEAL

Appellant's attorney respectfully certifies to the Court that he carefully reviewed the within record on appeal ... that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated

effective on the date file-stamped on this Motion.

Appendix, at A9.

The Court of Appeals subsequently reviewed the record for error and determined:

Initially, this court is troubled by the filing of an **Anders** brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks' and Smith's counsel in their respective appeals. Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeal, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. See, **State v. John A. Smith** (May 13, 1987) Montgomery App. No. 9168, unreported and **State v. Richard Brooks** (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention.***

State v. Penson, Appendix, at A5-6. The Court of Appeals did vacate petitioner's conviction for felonious assault, but otherwise affirmed his other convictions.

In petitioner's appeal to the Supreme Court of Ohio, he raised the following propositions of law.

1. Where appellate counsel files an "Anders brief" which does not comply with **Anders v. California** (1967), 386 U.S. 748, the appellate court must require counsel to comply with **Anders**, or appoint new appellate counsel, in order to guarantee appellant the due process and equal protection to which he is entitled under the Ohio and United States Constitutions.
2. An appellate court's examination of the record revealing merit in an "Anders brief" appeal requires the appointment of new counsel to prosecute the appeal, before a decision on the merits may be rendered in conformity with due process and equal protection of the law.

The Supreme Court overruled petitioner's motion for leave to appeal and claimed appeal as of right on the ground that no substantial constitutional question existed. Ohio Supreme Court Entry, Appendix at A1.

REASONS FOR GRANTING THE WRIT

1. The Ohio Courts' Continuing Failure To Require Compliance With *Anders v. California*, 386 U.S. 738 (1967).

At least five Ohio Courts of Appeal do not require appointed counsel on appeal to file a brief in compliance with the procedures mandated by *Anders v. California*, 386 U.S. 738 (1967), when counsel decides there are no appealable issues.² Petitioner's case is yet another example of these Ohio appellate Courts' continuing deviation from *Anders*. In at least three of these cases,³ the Supreme Court of Ohio has upheld the Court of Appeals' action.⁴ Thus, unless this Court grants certiorari, petitioner and other similarly situated defendants in Ohio will continue to be denied their constitutional rights to equal protection, due process, and effective assistance of counsel on direct appeal.

² See, e.g., the following cases attached in the Appendix at A10-26. *State v. Freels* (April 4, 1984), Ham. App. No. C-830585, unreported; *State v. McLindon* (Nov. 5, 1986), Ham. App. No. C-850868, unreported (First Appellate District); *State v. Birchfield* (Dec. 8, 1986), Butler App. No. CA86-07-099, unreported (Twelfth Appellate District); *State v. Sykes* (Jan. 26, 1984), Mahoning App. No. 92CA115, unreported; accord *State v. Toney* (1970), 23 Ohio App.2d 203 (Seventh Appellate District); *State v. Poole* (Oct. 20, 1987), Allen App. No. 1-86-43, unreported (Third Appellate District); petitioner's case is from the Second Appellate District. Cf. *State v. Duncan* (1978), 57 Ohio App.2d 93 (Eighth Appellate District).

³ *State v. Freels* and *State v. McLindon*, see fn. 1 and Ohio Supreme Court Entries, attached in Appendix, at A13 and A16, respectively; and the instant case.

⁴ The Ohio Supreme Court has also upheld a similar decision by another Ohio Court of Appeals. See *Laws v. Jago*, No. C-1-78-64, U.S. District Court, S.D. Ohio, Western Division, February 25, 1980, attached in Appendix, at A27.

In *Anders*, 386 U.S. 738, this Court set out the minimum constitutional requirements for appellate counsel who finds an appeal to be frivolous, i.e., no appealable issues. Counsel is required to advise the court the appeal is frivolous and request permission to withdraw. *Id.*, at 744. The request to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the appeal". *Id.* The Court stated why it imposed these procedures:

The constitutional requirement of substantial equality and fair process can only be attained where "counsel acts in the role of an active advocate in behalf of his client as opposed to that of *amicus curiae*". (Emphasis added.)

Accord *Jones v. Barnes*, 463 U.S. 745, at 754 (1983) ("*Anders* recognized that the role of the advocate requires that he support his client's appeal to the best of his ability").

In *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court recognized the right to effective assistance of appellate counsel and reiterated that appellate counsel

"must be available to assist in preparing and submitting a brief to the appellate court...and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim...".

Id., at 394. *Evitts* further reaffirmed *Anders*' minimum constitutional requirements for appellate representation:

A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This results is hardly novel. The petitioners in both *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967), and *Entsminger v. Iowa*, 386 U.S. 748, 18 L.Ed.2d 501, 87 S.Ct. 1402 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that counsel's failure in *Anders* to submit a brief on appeal and counsel's waiver in *Entsminger* of the petitioner's right to a full transcript rendered the subsequent judgments against the petitioner unconstitutional. (Emphasis added).

Id., at 396-397.

In petitioner's case, it is evident that appellate counsel did not comply with **Anders**. The "certification of meritless appeal" and motion to withdraw submitted by appellate counsel for petitioner did not set forth any assignments of error or refer to anything in the record which might arguably support the appeal. Counsel simply stated that he found no errors requiring reversal, modification, and/or vacation of petitioner's convictions or sentences and that he would not file a meritless appeal.

Moreover, the Ohio Court of Appeals failed to comply with **Anders** by failing to afford petitioner counsel once it determined there were several arguable grounds for appeal. See **State v. Penson**, Appendix at A5. As this Court stated in **Anders**, 386 U.S., at 744:

...if [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Thus, the minimum constitutional procedures established by this Court in **Anders** to guarantee a defendant's right to equal protection, due process and effective assistance of counsel on direct appeal were denied petitioner by the Ohio Court of Appeals.

The Ohio Supreme Court's subsequent dismissal of petitioner's appeal and those of similarly situated defendants, on the ground that "no substantial constitutional question exists," makes it apparent that Ohio's highest court will not require Ohio appellate courts to comply with **Anders** decision. Intervention by this Court is therefore necessary to guarantee petitioner and other defendants on direct appeal their fundamental constitutional rights to equal protection, due process, and effective assistance of counsel.

2. The Ohio Court of Appeals' Ruling That Appellate Counsel's Failure To File a Brief Can Be Considered Non-Prejudicial

or Harmless Error Is Inconsistent With the Decisions of This Court.

The Ohio Court of Appeals found that counsel's failure to submit a brief on the arguable claims in the record was non-prejudicial or harmless error. **State v. Penson**, Appendix at A2. Petitioner submits that the decisions of this Court indicate that prejudice must be presumed in this situation.

This Court's decision in **Evitts** makes this clear. In **Evitts**, 469 U.S. at 396-397, this Court stated that counsel's failure in **Anders** to submit a brief on appeal rendered the appellate court's judgment unconstitutional. The **Evitts** Court further held that appellate counsel must submit a brief to the court and play the role of an active advocate, rather than a friend of the court assisting in a detached evaluation of appellant's claim. Id., at 394.

Strickland v. Washington, 466 U.S. 668, 692 (1984), and **United States v. Cronin**, 466 U.S. 648, 659 (1984), further indicate that prejudice need not be shown where there's a constructive denial of counsel.⁵ Citing **Anders**, this Court held in **Cronin**, at 656-657:

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." **Anders v. California**, 386 U.S. 738, 743, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. (Footnotes omitted). (Emphasis added).

⁵ While **Strickland** and **Cronin** involved claims of ineffective assistance of trial counsel, petitioner submits their presumption of prejudice analysis of claims involving a constructive denial of trial counsel is equally applicable to a constructive denial of counsel on appeal.

Thus, the Court acknowledged that it would presume prejudice and find a Sixth Amendment violation where there is either a denial of counsel at a critical stage of the trial or where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing...". *Id.*, at 659.

If the *Strickland* and *Cronic* principles are applied in the appellate context, it is evident that counsel's failure to file a brief violates the Sixth Amendment right to the effective assistance of counsel. First, counsel has not played the role of an advocate. Secondly, counsel who fails to file a brief has not subjected the prosecution's case, i.e., the accused's conviction, to meaningful adversarial testing on appeal. In this situation, a defendant on appeal is effectively without counsel. Under *Strickland* and *Cronic* standards, prejudice must be presumed.

In addition, the *Anders* requirement that an adequate brief be filed has been upheld by most federal circuit courts without a showing of prejudice.⁶ In *Cannon v. Berry*, 727 F.2d 1020 (11th Cir. 1984), the Eleventh Circuit considered whether a showing of

⁶ See *United States v. Edwards*, 777 F.2d 364 (7th Cir. 1985) (Court denied counsel's motion to withdraw since he did not identify in his one-page "brief" any issues in the record that might conceivably be appealable); *Mylar v. Alabama*, 671 F.2d 1299 (11th Cir. 1982), cert. denied, ___ U.S. ___, 77 L.Ed.2d 1411 (1983) (Counsel's failure to submit a brief with appeal constituted ineffective assistance of counsel in that counsel did not function as an active advocate for his client; *United States v. Johnson*, 527 F.2d 1329 (5th Cir. 1976) (Counsel was denied permission to withdraw and ordered to submit a brief in compliance with *Anders* after counsel's first "brief" was deemed nothing more than a no-merit letter); *High v. Rhay*, 519 F.2d 109 (9th Cir. 1975) (Counsel rendered ineffective assistance when he merely stated the simple question of the sufficiency of evidence, failed to make a minimal statement of the facts, and invited the court to review the entire transcript itself); *Smith v. United States*, 384 F.2d 649 (8th Cir. 1967) (Permission to withdraw could not be granted due to counsel's failure to submit a brief referring to anything in the record that might be argued on appeal); *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968) (Counsel's brief which stated that there was no substance to the appeal does not satisfy *Anders*); *Robinson v. Black*, 812 F.2d 1084 (8th Cir. 1987) (Appellate counsel's brief inadequate where he briefed all issues in favor of government and concluded appeal was meritless.); Cf. *Griffin v. West*, 791 F.2d 1578 (10th Cir. 1986) (Absence of appellate brief not prejudicial because essential elements of the offense were uncontroverted).

prejudice was required to find ineffective assistance of appellate counsel where counsel fails to comply with *Anders*. The court found that counsel's failure to file a brief was the functional equivalent of having no counsel at all. *Id.*, at 1023.

The Court reasoned:

If a petitioner like Cannon had to show actual prejudice from the dismissal of his direct state appeal, notwithstanding the failure to follow the *Anders* procedures, there would be a considerable erosion in the enforcement of *Anders*.

Id., at 1024.

If the constitutional standards for appellate representation required by *Anders* are to have any meaning for defendants who exercise their right to appeal, the state and lower federal courts must enforce them. To say that a defendant must first show prejudice from their denial begs the question.

The Ohio Court of Appeals concluded that petitioner suffered no prejudice because it had reviewed the record and considered the assignments of error raised in petitioner's co-defendants' appeals. Petitioner submits that it makes a mockery of petitioner's right to counsel on appeal to suggest that it can be vicariously satisfied through co-defendants' counsel's representation. Co-defendants' counsel obviously did not represent petitioner's interests on appeal or present errors on his behalf. Petitioner submits that the right to counsel on appeal is a personal right and can only be satisfied by counsel who represents his interests and files a brief on his behalf.

3. The Need for Review by This Court.

A. This Court Needs To Resolve the Conflict and Confusion In the Lower Courts As To Whether Appellate Counsel's Failure To File a Brief On Direct Appeal Can Be Considered Non-Prejudicial or Harmless Error.

The Ohio Court of Appeals found that appellate counsel's failure to submit a brief on petitioner's behalf on the arguable

claims in the record was non-prejudicial or harmless error. **State v. Penson**, Appendix at A5. The Supreme Court of Ohio upheld the Court of Appeals. As indicated above, the decisions of this Court and most federal circuit courts indicate that prejudice is inherent in this situation. Nevertheless, at least one federal circuit, see **Griffin v. West**, 791 F.2d 1578, has found the failure to file an appellate brief non-prejudicial. Therefore, this Court needs to definitively decide this issue and resolve this conflict and confusion in the lower courts.

B. This Court Needs To Set Current Standards For Judging Counsel's Performance on Appeal.

Additionally, twenty (20) years have passed since the Court's decision in **Anders**. During that period the Court has decided what standards are applicable to claims of ineffective assistance of trial counsel. See **Strickland v. Washington**, 466 U.S. 668 (1984). Since **Anders** the Court has further guaranteed to criminal defendants the right to effective assistance of counsel on appeal. **Evitts v. Lucey**, 469 U.S. 387. However, the Court has not decided what standards should apply for judging the effectiveness of appellate counsel's performance on appeal. This case, involving an **Anders** appeal and virtually no performance by appellate counsel, presents the Court with the opportunity to make a needed decision on this issue, to clarify the **Anders** procedure, and to decide whether prejudice need be shown when there has been a constructive denial of appellate counsel.

C. This Court Has Granted Review On a Related Issue In McCoy v. Wisconsin, Court of Appeals, District I, No. 87-5002, prob. juris. noted, ___ U.S. ___, 98 L.Ed.2d 27 (1987).

This Court has granted review on a related issue involving an **Anders** appeal. See **McCoy v. Wisconsin Court of Appeals, District I, No. 87-5002, prob. juris. noted, ___ U.S. ___, 98**

L.Ed.2d 27 (1987). **McCoy** involves the constitutionality of a Wisconsin rule which requires counsel filing a no-merit brief to discuss why the issue that might arguably support the appeal lacks merit. While the Court will undoubtedly discuss the **Anders** requirements, the **McCoy** case necessarily deals with the constitutionality of a rule applicable only to Wisconsin. On the other hand, petitioner's case presents a more typical **Anders** situation where appellate counsel has failed to file a brief. Thus, a grant of plenary review in petitioner's case will give the Court an opportunity to more fully address the issues that surround a typical **Anders** appeal.

D. The Right To Equal Protection, Due Process, and Effective Assistance of Counsel On Appeal are Fundamental Rights Which Should Be Protected.

Finally, this Court has consistently held that indigent defendants are entitled to counsel on a first appeal, **Douglas v. California**, 372 U.S. 353 (1963), and that counsel must function in the role of an active advocate, as opposed to *amicus curiae*. **Anders**, 386 U.S. 744; **Evitts**, 469 U.S. at 394. The Court has further guaranteed to indigent defendants a complete and effective review of their convictions. **Entsminger v. Iowa**, 386 U.S. 748, 752 (1967). These constitutional guarantees have a hollow ring for all when our lower courts fail to enforce them. Additionally, when state courts apply harmless error tests to a complete denial of the fundamental rights of equal protection, due process, and effective assistance of counsel, these rights are substantially eroded. This case constitutes an obvious denial of these rights that are basic to our system of appellate review and should not be sanctioned by this Court.

The need for review by this Court is even more compelling because petitioner's case is not an isolated incident. As pointed out above, several Ohio Courts of Appeal do not require appointed counsel to follow the required **Anders** procedures,

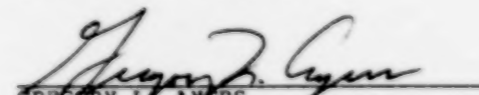
effectively vitiating the above constitutional guarantees. Moreover, the Ohio Supreme Court has refused to take corrective action to enforce these minimal due process safeguards. Petitioner and other similarly situated indigent defendants have no place to turn but the federal courts to obtain them. Review by this Court is therefore necessary to halt the erosion of these basic due process rights and restore to them the respect to which they are entitled.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio. Should the Court decide that plenary review is unnecessary in view of the clear conflict between the judgment of the Ohio Supreme Court and this Court's decision in *Anders*, 386 U.S. 738, petitioner alternatively requests that the Court summarily vacate the judgment of the Supreme Court of Ohio and remand the case to that court for further consideration in light of that case. Finally, should the Court initially decide not to grant plenary review or summarily vacate the judgment of the lower court, petitioner requests that the Court defer its decision to grant or deny certiorari pending its decision in *McCoy v. Wisconsin*, No. 87-5002, *prob. juris. noted*, ___ U.S. ___, 98 L.Ed.2d 27 (1987).

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender


GREGORY L. AYERS
Chief Counsel, Counsel of Record

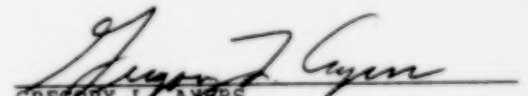
GEORGE A. LYONS
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on respondent State of Ohio by forwarding a copy to the office of its counsel, Lee C. Falke, Prosecuting Attorney, Montgomery County, Montgomery County Courthouse, 41 N. Perry Street, Dayton, Ohio 45402, by U.S. Mail this 21st day of December, 1987. I further certify that all parties required to be served have been served.


GREGORY L. AYERS
Counsel for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN ANTHONY PENSON,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

APPENDIX

The Supreme Court of Ohio
Columbus

1987 TERM

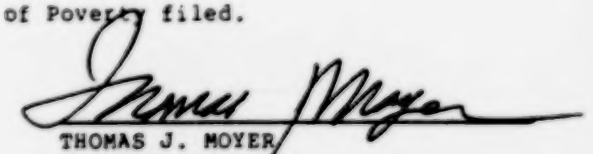
To wit: October 21, 1987

State of Ohio, :
Appellee, : Case No. 87-1341
v. : ENTRY
Steven A. Penson, :
Appellant. : 66-261

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.


THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of October, 1987.

MARCIA J. MENGEL CLERK

 DEPUTY

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee :
vs. : CASE NO. 9193
STEVEN ANTHONY PENSON : (C.P. #84-CR-1401)
Defendant-Appellant :

.....
OPINION

Rendered on the 5th day of June, 1987

.....
LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio,
By: MARK B. ROBINETTE, Assistant Prosecuting Attorney,
Appellate Division, Montgomery County Administration Building,
7th Floor, 451 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DOUGLAS R. SHAEFFER, P.O. Box 593, Dayton, Ohio 45420

STEVEN ANTHONY PENSON, K-3-56, #182582, P.O. Box 45699,
Lucasville, Ohio 45699-0001
Defendant-Appellant

.....
PER CURIAM:

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and

102-690

John Albert Smith, Jr. kicked in the front door of the apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Penson on one count of rape, with a firearm specification. On August 14, 1984 defendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification and a specification that defendant had been previously convicted in the State of Ohio of felonious assault.

Defendant was tried jointly with co-defendants Smith and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts

102-690

Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of having a firearm under a disability (Count twenty-nine).

On December 27, 1984 the trial court filed an entry and order sentencing defendant to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts Five, Six and Eight and not less than Three (3) years nor more than five (5) years on Count Twenty-Nine. On Count Two there is an additional term of three (3) years actual incarceration for the Firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other; said sentences to be served consecutively with the sentence imposed in 84 CR 1056, an amended entry and order was filed on January 9, 1985 to state

402 002

that all sentences pertaining to the rape counts were to be actual incarceration.

Defendant-appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. On June 2, 1986, appellant's counsel filed an Anders brief stating there was no meritorious issues to be considered on appeal. By decision and entry dated June 9, 1986 this court allowed Douglas Shaeffer to withdraw as counsel and granted appellant 30 days to file his own brief. Appellant was granted an extension on June 27, 1986. On July 24, 1986 appellant's request for the loan of the trial transcript was granted and he was given an additional 60 days to complete his brief. Another extension of 60 days was granted by entry dated September 15, 1986. On November 13, 1986 this court overruled appellant's request for the appointment of new counsel and granted appellant 15 more days to use the transcript. A final extension of 25 days was granted in which appellant was to file the brief. No brief was ever filed in the above captioned case.

Pursuant to our duties under Anders v. California (1967), 386 U.S. 738, this court must undertake a full examination of the record to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein. See also, State v. Toney (1970), 23 Ohio App. 2d 203.

Initially, this court is troubled by the filing of an Anders brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which

BOOK 102 PAGE 693

could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks and Smith's counsel in their respective appeals. Because we have thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeals, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. See, State v. John A. Smith (May 13, 1987) Montgomery App. No. 9168, unreported and State v. Richard Brooks (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention. The problem involves the trial court's failure to instruct the jury on an element of felonious assault. Appellant was charged in counts five and six with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. The trial court neglected to include the deadly weapon portion of the charge.

However, appellant's counsel failed to object to the charge as given. Absent plain error, the failure to object constitutes a waiver. State v. Underwood (1983), 3 Ohio St. 3d 12. Generally, failure to separately and specifically instruct on every essential element of the crime charged is not per se

plain error. State v. Adams (1980), 62 Ohio St. 3d 151. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. Id. at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count six, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.

OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and -- (crying)

Q. Were you face up or face down?

A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the jury. Accordingly, we must reverse appellant's conviction and vacate the sentence imposed on count six of the indictment. As modified, the judgment of the trial court is affirmed.

.....

WILSON, J., BROGAN, J., and PAIN, J., concur.

Copies mailed to:

Mark B. Robinette
Douglas R. Shaeffer
Steven Anthony Penson
Bon. W. Erwin Kilpatrick

102.500

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

State of Ohio,

Appellee,

vs.

Steven Anthony Penson

Appellant.

Case No. 9193

COURT OF APPEALS
1986 JUN 2 PM 4 25

MOTION

CLERK
MONTGOMERY COUNTY OH

CERTIFICATION OF MERITLESS APPEAL

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

CERTIFICATION OF SERVICE

On June 2, 1986, I served this document by Ordinary Mail Service upon:

Mr. Ted Millsbaugh
Prosecutor's Office
308 Mont. Co. Cts. Bldg.
41 North Perry Street
Dayton OH 45402

Mr. Steven Anthony Penson
K-3-56 #182582
P.O. BOX 45699
Lucasville OH 45699-0001

RESPECTFULLY SUBMITTED

Douglas R. Shaeffer 513/434-7667
Appellant's Attorney
1404 Beaverton Drive Suite 200
Kettering OH 45429

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

FILED
APR 4 1984
CLERK OF COURTS

STATE OF OHIO, : APPEAL NO. C-830585
Plaintiff-Appellee, : TRIAL NO. B-831785
vs. : MEMORANDUM DECISION
ALBERT FREELS, : AND
Defendant-Appellant. : JUDGMENT ENTRY.

Messrs. Arthur M. Ney, Jr., Seth Tieger, and Ms. Julie K. Wilson,
420 Hamilton County Courthouse, Court and Main Streets,
Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Albert J. Rodenberg, Jr., 3706 Cheviot Avenue, Cincinnati,
Ohio 45211, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the accelerated calendar of this Court pursuant to App. R. 11.1 and Local Rule 12, and was submitted for decision upon the record from the Court of Common Pleas of Hamilton County, Ohio, and the briefs and arguments of counsel.

Counsel for the defendant-appellant, Albert Freels, has reported to this Court that a searching review of the record has revealed to him no errors in the proceedings below prejudicial to the rights of his client upon which any assignment of error may be predicated. Counsel has, therefore, requested this Court to review the record independently to determine whether the proceed-

ings were free from prejudicial error and without infringement of the appellant's constitutional rights.

The record reflects that the appellant was properly charged in a single-count indictment, and that he entered a plea of no contest to the charge of felonious assault, viz., having knowingly caused, or attempted to cause, physical harm to another by means of a deadly weapon, to-wit, a knife. After duly informing the appellant of his rights and accepting the plea, the court ordered that a presentence investigation be made. Thereafter, upon consideration of the report, the court imposed a term of imprisonment in harmony with law. We are convinced that there were no infirmities in the proceedings that led to the acceptance of the plea, and that the sentence fell within the boundaries of the law. It is, therefore, our conclusion that the record of the proceedings below contains no demonstrative evidence of error prejudicial to the appellant's rights.

The conviction from which this appeal is taken is hereby affirmed, and it is, therefore, the Order of this Court that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

KEEFE, P. J., SHANNON and KLUSMEIER, JJ.

- 3 -

A12

The Supreme Court of Ohio 63-072
Columbus
ON COMPUTER

1986 TERM

To wit: January 29, 1986

State of Ohio,	:	
Appellee,	:	Case No. 85-1867
v.	:	E E T P Y
Albert H. Freels,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee. Affidavit of Poverty filed.

Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this
date _____

JAMES WM. KELLY CLERK

Sam J. Gacina
DEPUTY

A13

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, : APPEAL NO. C-850868
Plaintiff-Appellee, : TRIAL NO. B-842193
vs. :
WILLIE McLINDON, : MEMORANDUM DECISION
Defendant-Appellant. : AND
: JUDGMENT ENTRY.

FILED
ENC

NOV 5 1986

CLERK OF COURTS

Mr. Arthur W. Ney, Jr. and Ms. L. Susan Laker, 420 Hamilton
County Courthouse, Court and Main Streets, Cincinnati, Ohio
45202, for Plaintiff-Appellee,

Ms. Michele A. Ross, 914 Main Street, Suite 500, Cincinnati, Ohio
45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the oral arguments of counsel.

Counsel for defendant-appellant has reported to this Court that a careful review of the record has revealed to her no errors in the proceedings below, prejudicial to the rights of the appel-

lant, upon which any assignment of error may be predicated. Counsel, therefore, has requested this Court to review the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights.

Apparently there are two volumes of the transcript of the proceedings in the trial court in the case *sub judice*. Only one volume, that being volume two, has been filed with this Court. We have therefore examined the record as certified to us and find no error prejudicial to the appellant's rights in the proceedings in the trial court.

It is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

SHANNON, P.J., KEEFE and BLACK, JJ.

The Supreme Court of Ohio

Columbus

1987 TERM

To wit: March 25, 1987

State of Ohio,	:	Case No. 87-19	
Appellee,	:		
v.	:	E N T R Y	
Willie C. McLindon,	:		
Appellant.	:		

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

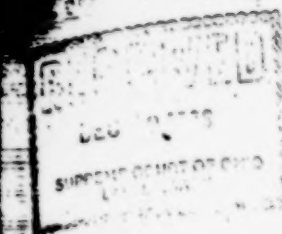
Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Robert L. Edington, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

ROBERT L. EDINGTON	ACTING CLERK
<i>R. L. Edington</i>	DEPUTY

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
BUTLER COUNTY

STATE OF OHIO,	*	CASE NO. CA86-07-099
Plaintiff-Appellee	*	
vs.	*	MEMORANDUM DECISION
PHILLIP P. BIRCHFIELD,	*	AND
Defendant-Appellant	*	JUDGMENT ENTRY
		12-8-86

John F. Holcomb, Butler County Prosecutor, Robin Piper, Assistant Butler County Prosecutor, Butler County Courthouse, Hamilton, Ohio 45011, for Plaintiff-Appellee

Patricia Shanes Oney, 633 Dayton Street, Hamilton, Ohio 45011, for Defendant-Appellant

PER CURIAM. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Butler County, Ohio, transcript of proceedings, and the brief of appellant, oral argument having been waived.

Counsel for defendant-appellant, Phillip P. Birchfield, has reported to this court that a careful review of the record has revealed to her no errors in the proceedings below prejudicial to the rights of appellant upon which any assignment of error may be predicated. Counsel, therefore, has requested this court to re-

Butler CA86-0

57
We view the record independently to determine whether the proceedings are free from prejudicial error and without infringement of appellant's constitutional rights. See Anders v. California (1967), 386 U.S. 738, 87 S.Ct. 1396.

We have accordingly examined the record and find no error prejudicial to appellant's rights in the proceedings in the trial court.

It is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by her counsel, excepts.

ROEHLER, P.J., JONES and HENDRICKSON, JJ., concur.

THE SUPREME COURT LAW LIBRARY

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

Vs.

LOUIS P. SYKES,

Defendant-Appellant.

OPINION.

CASE NO. 82 C.A. 115

APPEARANCES.

Vincent E. Gilmartin, Prosecuting Attorney, Mahoning County Courthouse, Youngstown, Ohio 44503, for Plaintiff-Appellee.

Donald P. Leone, 24 W. Boardman Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio,
Hon. Edward A. Cox, JJ.

Dated: January 26, 1984

DONOFRIO, J.

This appeal arises from a sentencing order dated October 29, 1982, imposing a thirty years to life on one count of an indictment charging defendant-appellant, Louis P. Sykes, with aggravated murder with specifications and a seven to twenty-five years term on the aggravated robbery count of the indictment. Timely notice of appeal was filed on November 5, 1982. On November 22, 1982, new appellate counsel was appointed. On July 8, 1983, counsel filed a no-merit brief contending that a thorough review of the record revealed no arguable prejudicial error which would support an appeal. Thereafter, notice was sent to the appellant to raise any assignments of error which he felt would support his appeal. To date, no response has been received.

Appellate counsel found no prejudicial error and we concur. A review of the record indicates the following procedures were had:

On November 10, 1981, appellant entered a plea of not guilty. Thereafter, certain discovery motions were filed by both the prosecutor and defense counsel. On March 24, 1982, appellant filed a plea of not guilty by reason of insanity. On March 29, 1982, a forensic examination of appellant's sanity was ordered. The requested report from the Forensic Center of District XI was filed on April 15, 1982. That same day, the

appellant filed written waivers of his right to a speedy trial and trial by jury. On April 19, 1982, pursuant to R.C. 2945.06, a three-judge panel was appointed to hear the case. Subsequently, on May 6, 1982, appellant entered a guilty plea to the indictment with specifications as charged. Appellant was found guilty and a pre-sentence investigation and further examination by two psychiatrists was ordered. Following receipt of the requested reports and following testimony on aggravating and mitigating circumstances, on October 29, 1982, sentence was imposed.

The only question present in the above-described proceedings is the absence of the withdrawal of the not guilty by reason of insanity plea. We feel, however, that appellant's later guilty plea clearly indicated his intention to abandon that plea.

The three-judge panel took great pains to inquire into the appellant's history and to the facts surrounding the crimes. Appellant was accorded all his statutory and constitutional rights. Therefore, we must affirm the judgment of the lower court.

Appointed counsel for appellant is permitted to withdraw for the reason that this is a frivolous appeal. *State v. Toney* (1970), 23 Ohio App. 2d 203.

Judgment affirmed.

O'Neill, P. J., concurs.
Cox, J., concurs.

APPROVED:

JUDGE.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

STATE OF OHIO, : CASE NO. 1-86-43

PLAINTIFF-APPELLEE, :

v. : JOURNAL

ROBERT L. POOLE, JR. : ENTRY

DEFENDANT-APPELLANT. :

This cause came on for determination on the request of Anthony L. Geiger heretofore designated as appellate counsel for the indigent defendant, Robert L. Poole, Jr., to withdraw as counsel and on counsel's motion for the Court to dismiss the appeal as frivolous, pursuant to the procedure set forth in Anders v. California (1967), 386 U.S. 738, 87 S. Ct. 1396.

Upon consideration the Court find that the said counsel has accompanied his request with a brief finding nothing in the record he considered might arguably support the appeal; that a copy of his request and brief with such references has been furnished to the indigent defendant; that time was allowed the defendant to raise any points that he chooses; that he has failed to file with the Clerk of this Court any legal points which he chooses to raise; that the Court has fully examined all of the proceedings to decide whether the case is wholly frivolous, and finds that no legal points having merit have been raised by counsel or by defendant and the appeal is wholly frivolous; that the request of counsel to withdraw should be allowed and that his motion to dismiss the appeal should be sustained.

It is therefore ORDERED that counsel's request to withdraw as appellate counsel be, and the same hereby is, granted, and ORDERED, ADJUDGED and DECREED that the appeal be, and the same hereby is, dismissed, at the costs of the defendant, appellant herein, for which execution is hereby awarded.

Exceptions saved.

Dated: October 20, 1987
b

John R. Evans
JUDGES

STATE OF OHIO

Plaintiff-Appellee

v.

ROBERT L. POOLE, JR.

Defendant-Appellant

CASE NO. 1-86-43

NOTICE REGARDING
FRIVOLOUS APPEAL;
MOTION TO WITHDRAW; and
MOTION FOR EXTENSION

Now comes Anthony L. Gelger, court-appointed counsel for defendant-appellant, Robert L. Poole, Jr., and notifies the court that in his opinion, and pursuant to the standards set forth in Anders v. California, 386 U.S. 738 (1967), there is no merit whatsoever in the appeal of this case and that the appeal is wholly frivolous. Counsel therefore moves the court for an order permitting him to withdraw as attorney for defendant-appellant, and in the alternative, for an extension of time for defendant-appellant to file his brief, if appropriate.

Anthony L. Gelger
Anthony L. Gelger of
Siferd & Siferd
210 Colonial Building
Lima, Ohio 45801
(419) 222-5045

Attorney for Defendant-Appellant

MEMORANDUM

After careful review of the entire record in this case, discussion with defendant-appellant and his family members, and

13 JW

legal research, counsel is of the opinion there is no merit to this appeal.

It is counsel's opinion that nothing appears of record that might arguably support the appeal. Further, it is counsel's opinion that there is no arguable basis for appeal.

wherefore, counsel respectfully requests the court to:

1. Furnish the defendant-appellant with a copy of this document, and allow him time to raise any points that he chooses;
2. Determine whether this case is frivolous; and, if so, that counsel be permitted to withdraw, and the court dispose of the case as the law may require. If the court finds this case is not frivolous then counsel requests the court to appoint other defense counsel to argue the appeal; and
3. Extend the time for defendant-appellant to file his brief, if appropriate, for a period which the court deems proper.

Respectfully submitted,

Anthony L. Geiger
 Anthony L. Geiger of
 Siferd & Siferd
 210 Colonial Building
 Lima, Ohio 45801
 (419) 222-5045
 Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the Office of the Prosecuting Attorney, 217 N. Main St., Lima, Ohio 45801, by regular U.S. mail / hand delivery this 26 day of March, 1987.

Anthony L. Geiger
 Anthony L. Geiger

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

FILED
 JOHN E. LYTLE, CLERK
 Feb 25 10 45 AM '80

ROBERT LAWS,

Petitioner, NO: C-1-78-64

vs.

ARNOLD JAGO,

MEMO, ORDER GRANTING PETITION

Respondent, FOR WRIT OF HABEAS CORPUS

Indexed	_____
Docketed	_____
Journal	_____
Motion	_____
Issue	_____
Card	_____

This is an action based upon an amended petition for writ of habeas corpus, 28 U.S.C. §§ 2241, et seq. In

petitioner's first petition he advanced these two grounds:

- 1) That he was denied the effective assistance of counsel at trial; and
- 2) That he was denied the effective assistance of counsel on appeal as a result of his appellate counsel's improper withdrawal under the standards set forth in Anders v. California, 386 U.S. 738 (1967).

Petitioner is represented by counsel on this habeas corpus petition.

The Court examined the petition and found that it did not supply sufficient factual allegations to support the grounds petitioner raised. Accordingly, petitioner was granted leave to supply a supplemental petition setting forth more specific factual allegations. Petitioner has filed an amended petition (doc. 13). Respondent has likewise filed a second return of writ (doc. 14). Petitioner has accompanied his new petition with a brief.

At page 2 of that brief it is stated that . . .

"... (1) in the original petition for habeas corpus the petitioner alleges that his counsel was ineffective because they did not subpoena certain records and witnesses that would have established an effective alibi. Possibly because of the passage of time, counsel for petitioner has not by this time been able to locate such records and witnesses. Therefore, this discussion shall be confined to the extremely important denial of the assistance of counsel at the appellate stage."

Thus, apparently petitioner has abandoned the first of his original two grounds (the ineffective trial counsel ground) and pursues only the second one (the Anders ground).

I

Petitioner was convicted of murder in the first degree (former § 2901.01, Ohio Rev. Code) in the Court of Common Pleas of Franklin County, Ohio, in November of 1972. His attorney thereupon filed a notice of appeal in the Franklin County Court of Appeals. Petitioner's attorney then filed a brief and served it both on petitioner himself and on the prosecutor. At page 3 of the brief, petitioner's attorney wrote that:

"... (t)his writer has carefully reviewed this case, including an exhaustive study of the Transcript of Proceedings, and has reached the conclusion that Defendant-Appellant has no legal ground for appeal in this case. This writer requested of Defendant-Appellant his written reasons why an appeal has legal merit in this case, but has received no response from Defendant-Appellant to this request. The only response received was a letter from one Kelly Chapman, who represents himself to be a "legal advisor" for the Southern Ohio Correctional Facility at Lucasville, Ohio."

In that letter Chapman told petitioner's attorney that petitioner "knows nothing relevant to legal matters." Chapman asked the attorney to file timely appeal notices and obtain a transcript and a continuance. This letter contains no particular assignments of error.

Petitioner's attorney, in the brief, cited Anders v. California, supra, and requested leave to withdraw.

The Franklin County Court of Appeals "carefully reviewed the record, including the transcript of evidence." State v. Laws, No. 72AP-404 (5/8/73), Decision, slip op., at 5.

The Court of Appeals stated that it had rarely seen a so "error-free" trial. Even if it had found error, the Court wrote, the error would have been harmless because of the overwhelming uncontradicted evidence. State v. Laws, supra, at 5-6.

The Court of Appeals went on to say that it was not error for the trial court to deny petitioner's last-minute motion for a continuance of the trial so that he could retain new counsel. Ibid., at 6-7. The Court found from the record that petitioner's counsel "overlooked no opportunity to protect his rights." Ibid., at 7. Finally, the Court said that it found

"... no error apparent from the record in connection with the impaneling of the jury, the admission or exclusion of evidence, the argument of counsel, or the charge of the trial court. The charge clearly and fairly set forth for the jury the law to be applied.

"Accordingly, after a careful consideration of the record, we find that defendant received a fair trial and that the record reveals no error prejudicial to defendant. The appeal is fully and completely frivolous.

"For the foregoing reasons, the request of appointed counsel to withdraw is sustained, and the judgment of the Court of Common Pleas is affirmed."

Ibid., at 8.

Petitioner pursued his appeal pro se to the Ohio Supreme Court assigning the following errors:

- "1. It was a denial of defendant-appellant's right to counsel on appeals where appointed appellate counsel filed motions to withdraw under Anders v. California, 386 U.S. 738 (1967),

and such motions were granted although appellate counsel failed to adhere to the requirements which must be met under the Anders rule.

"2. Where Ohio failed to provide adequate legal assistance to inmates attempting to file legal pleadings the Court below erred by refusing to acknowledge the pleadings and assistance given this appellant by a fellow inmate "jail-house" lawyer.

"3. The defendant-appellant was denied due process of law in violation of the Fourteenth Amendment for any and all errors apparent upon the face of the record and contained therein."

Memorandum in Support of Motion to Consolidate Appeals, State v. Laws, Case No. 73-505 (6/19/73), at 2. Petitioner's motion for leave to appeal from the Court of Appeals was denied on September 28, 1973, by the Ohio Supreme Court. The Court also sua sponte dismissed the appeal "for the reason that no substantial constitutional question exists herein."

Petitioner filed a petition to vacate the sentence and set aside the judgment of conviction, in the Franklin County Court of Common Pleas, on or about November 21, 1975. Laws v. State, Case No. 72 CR 03543 A. Petitioner argued that he was denied the effective assistance of counsel and requested a hearing. Petitioner cited therein about nine examples of the alleged denial of assistance of counsel. On February 27, 1976, the trial court determined that there were no substantive grounds for relief and dismissed the petition. State v. Laws, supra, Decision. Petitioner appealed that dismissal to the Franklin County Court of Appeals on the ground that the trial court should not have denied the petition without first holding an evidentiary hearing. The Court of Appeals affirmed State v. Laws, No. 76AP-215 (8/24/76), Decision. Petitioner sought leave to appeal to the Supreme Court but it was denied. State v. Laws, No. 76-1217 (1/28/77).

The factual background of Anders v. California, supra, the Supreme Court decision relevant to the facts of this case, is as follows:

After studying the record and consulting with Anders, a convicted defendant, counsel appointed by the California District Court of Appeals, concluded that he would not file an appellate brief. He was of the opinion "that there is no merit to the appeal," 386 U.S. at 739, and so advised the Court by letter. The Court denied Anders' request for the appointment of another attorney. So he proceeded to file his own brief pro se. The District Court of Appeals affirmed the conviction.

The Supreme Court found that the California courts had not made a finding that petitioner's appeal was frivolous. Also, the high court could not say that petitioner's counsel

"... acted in any greater capacity than merely as amicus curiae. . . . Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity."

386 U.S. at 743. The Court held that the failure to grant Anders, an indigent, the services on appeal of an advocate, rather than an amicus curiae, violated his constitutional rights to "substantial equality and fair procedure." 386 U.S. at 744.

The Supreme Court also established the following procedure for a criminal appellate attorney who finds his case to be wholly frivolous and therefore seeks to withdraw. He should advise the Court of his desire to withdraw and ask

permission to withdraw, while at the same time filing a brief "referring to anything in the record that might arguably support the appeal." 386 U.S. at 744. Then the appellate court should examine the record and determine whether the case is wholly frivolous. If it so finds and state law permits, the Court may then allow counsel to withdraw and dismiss the appeal. The Supreme Court stated further that a bare "no-merit" letter without a brief affords neither the client nor the Court any aid. 386 U.S. at 745.^{1/}

Some courts have interpreted Anders as establishing a distinction between appeals which are frivolous, from which counsel is permitted to withdraw, and those which are merely without merit, from which counsel is not permitted to withdraw. Note, Withdrawal of Appointed Counsel from Frivolous Indigent Appeals, 49 Ind. L. J. 740, 747 n. 32 (Summer 1974); Hermann, Frivolous Criminal Appeals, 47 N.Y.U. L. Rev. 701, 705-708 (1970); American Bar Association, Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals, at

^{1/} The constitutional underpinnings of the rule or procedures announced in Anders are not entirely clear, however. The Supreme Court does not seem to say that the specific procedures it set forth in Anders are themselves constitutionally required. Schrock and Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1120 n. 24 (1978). The Anders procedure may not amount to a matter of personal constitutional right. Instead, it seems to be a prophylactic measure, in the fashion of the Miranda warnings, designed to ensure respect for constitutional rights, such as the effective assistance of counsel on appeal. Ibid.

77 (Approved Draft 1970). It is certainly a "fine distinction," Sanchez v. State, 85 Nev. 95, 98, 430 P. 2d 793, 795 (1969), and some courts have rejected the distinction between frivolity and lack of merit. Note, Withdrawal of Appointed Counsel, supra.

In Suggs v. United States, 391 F. 2d 971 (D.C. Cir. 1968), appointed counsel filed with the circuit court of appeals and sent to the prosecution a brief and motion to withdraw "whose manifest thrust," according to the Court, was to show that there was "no substance" to any of appellant's pro se specifications of alleged error. 391 F. 2d at 972. The prosecution in effect adopted the brief. A 2-1 majority, by Judge Leventhal, viewed the brief filed by appellant's counsel as an impermissible "brief against the client" and strongly disapproved of the practice of sending a copy to the prosecution:

"Appointed counsel is of course not required to accept a client's view by asserting points his good conscience would reject even at the loss of a handsome fee. At the same time counsel cannot file a brief against his client. It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when the counsel appointed by one arm of the Government seems to be helping another to seal his doom."

391 F. 2d at 974.

" * * * [I]f the Government had sought a summary disposition by motion for affirmance, it would have had the burden of showing that there was nothing in this case that could conceivably present a non-frivolous question. Now that burden has been shouldered by the lawyer appointed by this Court to represent appellant. It is perhaps not unreasonable to suppose that if this course were approved

as a precedent it would so embitter the indigent defendants involved as to undercut any possible rehabilitative objective of detention."

391 F. 2d at 975.

While other courts besides the Suggs court have held that a brief accompanying a motion to withdraw which argues that there is no substance to the appeal does not satisfy Anders, e.g.; United States v. Johnson, 527 F. 2d 1328 (5th Cir. 1976); Smith v. United States, 384 F. 2d 649 (8th Cir. 1967), still others have not objected to a brief in this form. E.g., United States v. Camodeo, 383 F. 2d 770 (2d Cir. 1967); People v. Jones, 38 Ill. 2d 384, 231 N.E. 2d 390 (1967). In Jones, however, appointed counsel also listed the points the client wanted to raise. And in Camodeo, counsel also set forth the legal contentions that could be based on the record.

Anders-type claims have been treated by the federal courts by way of habeas corpus. E.g., Hutchinson v. Craven, 415 F. 2d 278 (9th Cir. 1969); Harders v. State of California, 373 F. 2d 839 (9th Cir. 1967).

In Benoit v. Wingo, 423 F. 2d 880 (6th Cir.), cert. denied, 400 U.S. 852 (1970), a habeas corpus petitioner's court-appointed counsel had filed a timely notice of appeal and secured an extension of time for the perfection of the appeal. However, after some research on the case he wrote petitioner that he would not be proceeding on the appeal because he did not consider it meritorious; instead, he considered the appeal a "waste of time." 423 F. 2d at 882. Petitioner sought relief in the trial court by moving to vacate the conviction. But this motion was denied by the trial court. The state appellate court affirmed that denial on the ground that petitioner's motion did not demonstrate that he had asked his counsel to proceed with the appeal.

The Sixth Circuit felt however, in reviewing the U.S. District Court's denial of habeas relief, that once the notice of appeal was filed it made no difference whether petitioner had asked his counsel to proceed with the process of appeal. Petitioner "had a right to rest with the assurance that his appeal was being processed." 423 F. 2d at 883. The Circuit Court concluded that, the appeal having been begun, petitioner was not afforded the effective assistance of counsel to prosecute it. Therefore, the Court remanded the case with instructions that the State be given an opportunity to provide petitioner with a review of his conviction on direct appeal, with the benefit of counsel, as if counsel had pursued the appeal in the first instance.

III

In the present case, the Ohio Court of Appeals for Franklin County found that petitioner Laws' appeal was "fully and completely frivolous." State v. Laws, No. 72AP-398 (4/24/73) slip. op., at 6. However, in this Court's judgment, petitioner's court-appointed counsel did not act "in any greater capacity than merely as amicus curiae." Anders v. California, 386 U.S. at 743. Thus, petitioner did not receive "that full consideration and resolution of that matter as is obtained when counsel is acting in that capacity." Anders, supra. His counsel submitted a brief which did not attempt to outline any possible legal issues or give the Court of Appeals any guidance to conduct its review of petitioner's conviction to see if the appeal was in fact completely frivolous, as the Court is required by Anders to do. Thus, petitioner was effectively without counsel on his appeal. The failure even to mention any arguable legal issues, whether or not they might eventually justify a reversal of the conviction,

is in this Court's judgment a violation of Anders. Appellate counsel's task is to advocate, not to judge, his client's case.

In Anders, the Supreme Court made it clear that any procedure which employs conclusory "no-merit letters" as a means of permitting legal counsel to withdraw from the appeal is contrary to the sense of duty owed by both the courts and appointed counsel to an indigent defendant seeking appeal of his conviction. This petitioner's appellate counsel did not even refer to any possible issues in his brief, even to explain why they were frivolous. Anders only requires that an attorney seeking permission to withdraw must file "a brief referring to anything in the record that might arguably support the appeal." (Emphasis added.) 386 U.S. at 744. In that way, the Court of Appeals would at least be directed to portions of the record where review is warranted--where the appointed counsel believes an arguable issue might exist even though he may believe there in fact is none.

Petitioner has presented several specific arguable grounds for appeal on the trial record. These include: (1) whether the State proved the trial court's venue; (2) whether petitioner was entitled to an instruction on the uncorroborated testimony of an accomplice; and (3) the admissibility of the testimony of Wylie Bates as to petitioner's prior criminal conduct. Brief in Support of Writ, at 5, attached to Amended Petition for Writ of Habeas Corpus (doc. 13). Petitioner's counsel, however, failed to refer in his "no-merit" brief to anything that might even arguably support an appeal. Therefore, that brief did not comport with the requirements of Anders.

Of course, this Court does not hereby conclude that any

of these grounds merits either habeas relief or an order by an appellate court vacating the conviction. But petitioner has not received "that full consideration and resolution" obtainable when an appellant is pursuing his appeal with the benefit of counsel. Anders, 386 U.S. at 742. None of the above issues were specifically considered by the Franklin County appellate court on petitioner's first, pro se appeal.

It is worth noting that petitioner's appellate counsel served a copy of his "no-merit" brief upon the prosecutor, a practice of which the D. C. Circuit Court of Appeals strongly disapproved, in Suggs v. United States, supra. However, other courts, such as the Second Circuit Court of Appeals, approve of that practice. Hermann, supra, 47 N.Y.U. L. Rev. at 713-14, n. 58.

Respondent argues in his supplemental return of writ that petitioner's appellate counsel complied with the procedural requirements of Anders v. California, supra, even though the brief he prepared did not set forth any arguable appellate issues. Respondent stresses that (1) petitioner's counsel, according to the "no-merit" brief, carefully reviewed petitioner's entire case, and (2) wrote to petitioner requesting no direct response from his client. That letter left petitioner with the task of preparing and submitting an appellate, pro se brief from scratch. Anders is clear that even if counsel finds his case to be wholly frivolous, he should accompany his withdrawal request to the Court with a brief referring to anything in the record that might arguably support the appeal. 386 U.S. at 744. In the present case, the Court

of Appeals decided that petitioner's appeal was frivolous and therefore dismissable without the benefit even of the limited brief required by Anders. The present record does not show that petitioner even filed a pro se brief before the Court of Appeals dismissed his appeal.

Respondent also argues that Anders notwithstanding, none of the issues petitioner raises even now have merit. It is noteworthy, however, that the Supreme Court in Anders did not rest its holding on its view of the merits of petitioner's case.^{2/} Respondent's contention that none of petitioner's specific allegations constitute reversible error is beside the point. See Suggs v. United States, 391 F. 2d at 975-976. Furthermore, as discussed above, the Anders opinion distinguishes between completely frivolous appeals and appeals without merit.

This Court is also not persuaded that petitioner's counsel's labelling his appellate court pleading a "brief" makes any difference in terms of Anders. The brief filed on petitioner's behalf is no different from the "no-merit" letter to the Court of Appeals in Anders.

An Ohio court considered the question whether "due process require(s) the marshalling of some argument on behalf of an indigent when competent counsel can discover no error in the record . . .," in State v. Toney, 23 Ohio App. 2d 203, 206 (Mahoning Co. App., 1970). There a notice of appeal was filed on behalf of the convicted defendant. Toney himself went

^{2/} Indeed, the dissent in Anders had great difficulty in perceiving an "arguable" issue in that petitioner's appeal. 386 U.S. at 748, fn.

went ahead and filed a pro se brief with assignments of error. After that his counsel filed a brief wherein he stated:

"The writer has made a diligent search of the bill of exceptions and made a careful research of the law which might 'arguably support appeal,' and we are unable to substantiate any of the defendant's assignments of error."

23 Ohio App. 2d at 205. Following Anders as it read that decision, the Court of Appeals examined Toney's pro se arguments in his brief and agreed with counsel that there were no errors arguably supportable on appeal. The Court found the appeal frivolous and affirmed the conviction. It granted counsel's motion to withdraw and held that Toney received adequate and fair appellate representation.

The Toney case is distinguishable from the present situation in at least this respect. There the appellant had himself at least filed a pro se appellate brief which directed the attention of the Court of Appeals to particular portions of the record, for specific allegations of error. In its opinion the Court of Appeals did not pick out and explicitly consider any of the three issues petitioner now raises on habeas corpus through his new counsel. But if the Toney case is in fact in conflict with the present decision of this Court, the position of the Toney court is rejected.

No evidentiary hearing is necessary. Rule 8(a), Rules Governing § 2254 Proceedings.

The Petition for Writ of Habeas Corpus is granted. The State of Ohio is directed to provide petitioner Laws with an appointed counsel who shall pursue a delayed appeal, (or) at the very least, seek leave to file a delayed appeal and file a brief which sets forth any at least arguable grounds for review. See Anders v. California, supra.

Petitioner's appeal should be considered a "direct"
rather than "delayed" appeal, just as if petitioner had
been vigorously represented in his first appeal.

If petitioner Laws has not been appointed counsel within
sixty days of the date of this Order, he shall be released.

SO ORDERED.


United States District Judge

-14-

A40

FILED
JOHN D. LYTHER, CLERK
Mar 12 9 23 AM '80
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WEST DIV. CINCINNATI

ROBERT LAWS,) NO. C-1-78-64
Petitioner)
v.) ORDER GRANTING MOTION
ARNOLD R. JAGO, SUPT.,) TO ALTER OR AMEND
Respondent) JUDGMENT
RECEIVED
MAR 17 1980

On February 25, 1980 this Court entered a Memorandum
Opinion, Order, and Judgment granting petitioner Laws'
petition for a writ of habeas corpus (doc. 18, 19). See
generally 28 U.S.C. § 2243. Within ten days of the entry of
the Judgment and pursuant to Federal Rule of Civil Procedure
59(e), respondent Jago served on petitioner's trial attorney
a motion to alter or amend the Judgment (doc. 20). See
generally Fed.R.Civ.P. 5(b).

Respondent's motion is well taken, cf. Mitchell v.
Salisbury, 443 F.2d 324 (6th Cir. 1971) (per curiam)
(altering order of district court in habeas action by replac-
ing state appellate court with state officials), and is
GRANTED. The Judgment (doc. 19) is altered to read: "The
State of Ohio is directed to" In all other respects -
and particularly insofar as the last sentence of the Judgment
pertains to respondent Jago, the Judgment remains unaffected
by this Order.

SO ORDERED.


United States Senior District Judge

A41

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
JOHN E. LYTER, CLERK
FEB 25 10 45 AM '80
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

ROBERT LAWS,) NO. C-1-78-64
Petitioner)
v.)
ARNOLD JAGO,)
Respondent)

JUDGMENT
RECEIVED
FEB 28 1980

Indexed	_____
Docketed	_____
Journal	_____
Motion	_____
Issue	_____
Card	_____

DEPT. OF CRIMINAL JUSTICE

The petition for a writ of habeas corpus is granted.
See Anders v. California, 386 U.S. 738 (1967) and Benoit v. Wingo, 423 F.2d 880 (6th Cir. 1970); c.d.

Respondent is directed to -

- Provide petitioner with a meaningful direct appeal with effective assistance of counsel (to initiate appeal to both Ohio appellate courts, if necessary) within a reasonable time;
- The appeal(s) shall be as adequate and direct as if counsel had *persuaded* them effectively in the first instances - the delay will not affect the grounds;
- Petitioner will be afforded counsel and the appeal will be effectively docketed in the first instance in 90 days.

In lieu of compliance with the above, the respondent will release the petitioner and discharge him from custody.

[Signature]
United States Senior District Judge